Supreme Court, U. S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-28

JOHN WILMOT, Superintendent, Elmira Correctional Facility,

Petitioner,

against

WILLIAM WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether a suspect in a criminal investigation can validly waive his rights to remain silent and to have counsel present even though he was not fully and specifically informed by the law enforcement officials of the precise nature of the charges forming the subject matter of the interrogation?

TABLE OF CONTENTS

	PAGE
Question Presented	1
Decisions Below	1
Jurisdiction	1
Statement of the Case	1
REASONS FOR GRANTING THE WRIT	4
I. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT YET BEEN ANSWERED BY THIS COURT	4
II. THE DECISION BELOW IS IN CONFLICT WITH OTHER FEDERAL DECISIONS	5
III. THE DECISION OF THE COURT BELOW IS PLAINLY WRONG	7
Conclusion	12
Appendix A—Decisions of the United States District Court for the Eastern District of New York	13
Appendix B—Decision of the United States Court of Appeals for the Second Circuit	22

TABLE OF AUTHORITIES

Cases:

Collins v. *Brierly*, 492 F. 2d 735 (3d Cir.) (*en banc*) cert. denied, 419 U.S. 877 (1974)	6
Commonwealth v. *Collins*, 436 Pa. 114, 259 A. 2d 160 (1969)	6
Escobedo v. *Illinois*, 378 U.S. 478 (1964)	5

PAGE

Harris v. *Riddle*, 551 F. 2d 963 (4th Cir. 1977) 6

Miranda v. *Arizona*, 384 U.S. 436 (1966) 2, 3, 5, 9, 10

Rhode Island v. *Innis*, No. 78-1076, 48 U.S.L.W. 4506 (1980) 5

Schenk v. *Ellsworth*, 293 F. Supp. 26 (D. Mont. 1968) 6

United States v. *Anderson*, 533 F. 2d 1210 (D.C. Cir. 1976) 6

United States v. *Campbell*, 431 F. 2d 97 (9th Cir. 1979) 6

United States v. *Dorsey*, 591 F. 2d 922 (D.C. Cir. 1978) 6

United States ex rel. Kern v. *Maroney*, 275 F. Supp. 435 (W.D. Pa. 1967) 11

United States ex rel. Smith v. *Fogel*, 403 F. Supp. 104 (N.D. Ill. 1975) 6

United States v. *Hall*, 396 F. 2d 841 (4th Cir.), cert. denied, 393 U.S. 918 (1968) 6

United States v. *Minor*, 399 F. Supp. 990 (W.D. Pa. 1975), affd. mem., 544 F. 2d 513 (3d Cir. 1976) .. 6

United States v. *Thevis*, 496 F. Supp. 490 (D. Conn. 1979) 6

Von Moltke v. *Gillies*, 332 U.S. 708 (1948) 5

Statutes:

28 U.S.C. § 1254 1

28 U.S.C. § 2101 1

28 U.S.C. § 2241 *et seq.* 3

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Decisions Below

The memorandum-decision of the United States District Court for the Eastern District of New York appears in Appendix A. The memorandum-decision of the Court of Appeals appears in Appendix B. Both decisions are unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 23, 1980. A rehearing by the Court of Appeals was not sought. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 210(c).

Statement of the Case

At about 4:00 p.m. on September 4, 1973, respondent William Walker (hereinafter referred to as "Walker") and his co-defendants, Roy A. Sanders and Seth Lee Doby, were arrested in connection with the fatal shooting of a storekeeper a short while before, and taken to a station house where they were given *Miranda* warnings (H. 11).* At approximately 5:15 p.m., Detective Arthur Lasky began questioning Doby, who confessed within 15 minutes (F. 171-172, 181-183, 204, 205, 206). Thereafter, Lasky spoke to

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* Parenthetical numerical references preceded by "C" through "H" refer to pages of the Appendix filed with the Court of Appeals, a copy of which Appendix will be certified and filed as the record of this case upon request of the Clerk of the Court or petitioner pursuant to Rule 13 of the Rules of the Supreme Court.

Sanders, who also quickly confessed (F. 172-175, 185, 187, 205). Around 7:15 p.m. Lasky began to talk with Walker. Upon being advised of his *Miranda* rights for the second time, Walker declined to make a statement (F. 177, 206).

Assistant District Attorney William Weinman arrived at the station house about 6:00 p.m. and interrogated Doby and Sanders first, obtaining confessions from both of them. Subsequently, at around 8:30 p.m., Weinman began speaking with Walker, telling him that he wanted to ask him "some questions about an incident that took place at a grocery store" earlier in the day. After *Miranda* warnings were given to Walker for the third time, Walker declined to give Weinman a statement. Weinman thereupon thanked Walker and stated that the interview was concluded (F. 153-154, 164). At this point, the reporter was excused and the next ten minutes are off the record (F. 156).

According to the testimony of Lasky and Weinman at the state suppression hearing and the hearing in the District Court, they had a conversation between themselves concerning the charges against Walker, which included homicide (F. 156, 166). Overhearing the discussion of the charges, Walker asked what he was going to be charged with, and Weinman told him robbery and homicide. Walker replied, "What do you mean homicide? I didn't shoot anyone" (F. 156). Then, either Weinman or Lasky responded to the effect that they knew he didn't shoot anyone "because Sanders has already admitted that he was the shooter but he implicated you [Walker] because he said you were present in the store with a gun." Thereupon, Walker requested to speak with Sanders, who confirmed that he (Sanders) had confessed to the shooting. Immediately after talking with Sanders, Walker indicated that he wished to make a statement, saying "I will talk to you now" (F. 156), "I will tell you now what happened" (F. 177-178).

At about 8:34 p.m., after the stenographer returned, Walker stated, "I asked you what charge it was, you said you'll see what it is and I still want to know the charge." Weinman answered, "At this point, the charge is attempted robbery and homicide." Walker protested, "I didn't shoot nobody." Weinman then replied "Nobody said you shot anybody, why don't you tell me what happened." Walker then proceeded to give a statement implicating himself in the crime.*

Subsequently, in 1975 Walker pleaded guilty to felony murder in New York State Supreme Court, Kings County, after the State Court denied his motion to suppress his confession. Walker was sentenced to 15 years to life. The judgment of conviction was affirmed by the Appellate Division, Second Department, and the New York State Court of Appeals denied leave to appeal.

On December 1, 1977, Walker filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 2241, *et seq.*, claiming that his confession was obtained in violation of his constitutional rights. The District Court, per Honorable Charles P. Sifton, denied the petition, holding that Walker's confession was not procured in violation of the procedural safeguards of *Miranda*, and that Walker's confession was voluntary and resulted from a knowing and intelligent waiver of his constitutional right. The District Court then issued a certificate of probable cause to appeal. On June 29, 1979, the Court of Appeals remanded the proceeding to the District Court for further consideration, emphasizing that since the case presents "difficult issues on which strong arguments can be made either way . . . it would seem essential to have the fullest possible information as to what actually occurred". *Walker* v. *Wilmot*, 603 F. 2d 1038, 1041 (2d Cir. 1979).

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* The recorded statement given by Walker is Document 14(a), Record on Appeal.

Upon remand, following an evidentiary hearing, the District Court held, in a memorandum decision dated December 2, 1979, that Walker's decision to confess "was not knowing and intelligent, but was instead based on confession and mistake" because of "the absence of precision with regard to the charges to be leveled against [Walker] and the impression incorrectly conveyed to him that he could avoid prosecution for killing a man by confessing, whether deliberate on the part of the District Attorney or not . . .". In a memorandum order dated April 23, 1980, the Court of Appeals affirmed, ruling that the District Court's "finding was not clearly erroneous" and that it was not "reversible error for the judge to conclude on the basis of this finding that '[t]here was hence no voluntary waiver of [Walker's] Fifth Amendment rights . . .'".

Reasons for Granting the Writ

I. This Case Presents An Important Constitutional Question Which Has Not Yet Been Answered By This Court.

This case presents the important constitutional question whether a suspect in a criminal investigation can validly waive his rights to remain silent and to have counsel present even though he was not fully and specifically informed by the law enforcement officials of the precise nature of the charges forming the subject matter of the interrogation. This question has not been, but should be settled by this Court.

In *Von Moltke* v. *Gillies,* 332 U.S. 708, 723-4 (1948), this Court stated that the defendant at trial must be informed of the charges against him and the possible range of punishment before he can waive his right to counsel. While an argument could be made that this Court's repeated reference to the functional equivalence of trial and pretrial questioning (see, e.g., *Escobedo* v. *Illinois,* 378 U.S.

478 [1964]) suggests that the police must provide a criminal suspect with similar information prior to interrogation, this Court has never made a definitive ruling in this regard.

In its recent decision in *Rhode Island* v. *Innis*, No. 78-1076, 48 U.S.L.W. 4506 (May 12, 1980), this Court addressed for the first time the meaning of "interrogation" under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

We respectfully submit that the case at bar presents yet another unique opportunity for further clarification of *Miranda*. Indeed, unless this Court gives some guidance on the question presented herein, there will continue to be uncertainty and confusion among the police, prosecutors, defense counsel and judges.

II. The Decision Below Is In Conflict With Other Federal Decisions.

The decision of the Court of Appeals which upheld the District Court's conclusion—that a criminal suspect must be informed precisely of the nature of the charges about which he is being questioned before he may validly waive his *Miranda* rights—is in direct conflict with decisions of other Circuit Courts of Appeal.

Federal Courts in the Third, Fourth, Seventh, Ninth, and District of Columbia Circuits have ruled that a suspect in a criminal investigation may validly waive his rights to remain silent and to have counsel present even though he was not fully and specifically informed of the precise nature of the charges forming the subject matter of the interrogation or investigation. *United States* v. *Dorsey*, 591 F. 2d 922 (D.C. Cir. 1978); *Harris* v. *Riddle*, 551 F. 2d 936 (4th Cir. 1977); *United States* v. *Anderson*, 533 F. 2d 1210 (D.C. Cir. 1976); *Collins* v. *Brierly*, 492 F. 2d 735 (3d Cir.) (*en banc*) cert. denied, 419 U.S. 877 (1974); *United States* v. *Campbell*, 431 F. 2d 97, 99 n.1

(9th Cir. 1979); *United States* v. *Hall,* 396 F. 2d 841 (4th Cir.), cert. denied, 393 U.S. 918 (1968); *United States ex rel. Smith* v. *Fogel,* 403 F. Supp. 104 (N.D. Ill. 1975); *United States* v. *Minor,* 399 F. Supp. 990, 992 (W.D. Pa. 1975), affd. mem., 544 F. 2d 513 (3d Cir. 1976).

In *Collins* v. *Brierly, supra,* the Court of Appeals for the Third Circuit explained: "Nowhere [in *Miranda*] is there the slightest indication that there must be included a warning about the nature of the crime which has led to the interrogation conference, what the penalty is for the offense, what the elements of the offense consist of, and similar matters." 492 F. 2d at 738-739. Subsequently, in *Harris* v. *Riddle, supra,* the Fourth Circuit Court of Appeals stated that the police have no duty to explain misapprehensions under which the defendant is obviously proceeding regarding the rules of evidence or the substantive elements of the offense under investigation. 551 F. 2d at 938-939.

While the District Court did not cite any cases during the course of its opinion, it appears that the Court relied on cases such as *Schenk* v. *Ellsworth,* 293 F. Supp. 26 (D. Mont. 1968), where the Court held that a person being interrogated must be informed of the crime which he is suspected of having committed before he can knowingly and intelligently waive his right to counsel, and *Commonwealth* v. *Collins,* 436 Pa. 114, 121, 259 A. 2d 160, 163 (1969), where the Court held that "an intelligent and understanding waiver of the right to counsel is impossible where the defendant has not been informed of the crime which is being investigated."

We respectfully submit that the conflict between the Court of Appeals for the Second Circuit and other Courts of Appeals can only, and in fact, must be resolved by this Court.

III. The Decision Of The Court Below Is Plainly Wrong.

The District Court's holding that Walker did not intelligently and knowingly waive his Fifth Amendment rights was based on the following two conclusion: 1) there was an "absence of precision with regard to the charges to be leveled against [Walker]"; 2) there was "impression incorrectly conveyed to him that he could avoid prosecution for killing a man by confessing, whether deliberate on the part of the District Attorney or not . . .".

In affirming the ruling of the District Court, the Court of Appeals concluded that "this finding was not clearly erroneous" and that it was not "reversible error for the judge to reach its holding on the basis of this finding."

The State asserts that to the extent that the aforementioned conclusions of the District Court may be deemed "findings of fact," such findings are clearly erroneous. Accordingly, these findings should have been set aside by the Court of Appeals since they are without evidentiary support and were apparently induced by a misapprehension of controlling substantive principles. Moreover, it was reversible error for the Court of Appeals and the District Court to conclude that Walker did not knowingly and intelligently waive his Fifth Amendment rights.

A.

According to Walker's testimony, before overhearing that he would be charged with homicide and attempted robbery, Walker "thought the charge was attempted robbery or possession of a gun," since he "didn't shoot nobody." When Walker ascertained that he was going to be prosecuted for "homicide", he thought "it meant that somehow they figured that I did it, that I shot the man" (G. 26). Misunderstanding the substantive elements of the offense of felony murder, notwithstanding the officials' explanation

of the charge, Walker believed that the charge was unjustified because he "didn't shoot nobody". Walker apparently thought that personally firing the murder weapon was essential to charging him with the crime. According to Walker's testimony, notwithstanding the fact the officials specifically advised Walker that Sanders confessed to be the "shooter" (F. 156; F. 177), Walker somehow had the distinct impression that his co-defendants "were telling [the police], that I did it, and that the charge was going to stick on me" (G. 26). According to Walker, "I figured I was going to have to also clear myself, too. I didn't know the charge was for murder" (G. 27).

Based on Walker's own testimony, it is abundantly clear that Walker made a voluntary decision to speak in an attempt to "clear himself" in the mistaken belief that the officials were accusing him of firing the gun that killed the storekeeper by virtue of their reference to homicide. Walker believed he was exculpating himself by voluntarily deciding to tell the officials that he was at the scene of the crime with a gun, but that he "didn't shoot nobody".

An analysis of he decisions below reveal that the Courts below, misconstruing the requirement of a "knowing" and "intelligent" waiver, apparently believed that an accused must be aware of the precise nature of the charges. The State submits that while Walker may have been confused and mistaken about the nature of felony-murder, the type of "intelligence" required for waiver under *Miranda* was present when Walker understood that he need not speak at all. As the transcript of Walker's testimony which was offered in the District Court clearly reveals, Walker was advised of and understood each and every *Miranda* right (G. 29-32). Walker never intimated in any way that he did not grasp the significance of the *Miranda* warnings. It is significant to point out that Walker declined to talk to Lasky and Weinman, upon being advised of his rights. As was noted in *United States* v. *Thevis*, 496 F. Supp. 490

(D. Conn. 1979), the clearest indication that an accused understood his right to remain silent was that he invoked the right.

The Courts below saw fit not to elaborate on the difficult issue raised by this petition, notwithstanding the fact that that issue permeated the entire case. The reluctance on the part of the Court below to squarely confront such a troublesome question, which surely arises in countless custodial arrests situations every year, may very well have been attributable to the absence of an explicit decision by this Court on this matter which remains unresolved.

B.

The State respectfully submits that, notwithstanding the District Court's determination to the contrary, the record in this case amply demonstrates that Walker was adequatey informed of the charges against him. While the term "felony murder" may not have been specifically mentioned by the law enforcement officials in apprising Walker of the charges, Walker was in effect given an explanation of the substance of felony murder. The record reveals t at Walker was advised that he was being charged with homicide even though his co-defendant Sanders confessed to firing the fatal shot and despite the fact that Walker "didn't shooting nobody". Walker was further advised that Sanders had implicated him by saying that W.lker was present in the store with a gun. Walker then demanded to talk with Sanders who confirmed that he (Sanders) had, indeed, confessed to the killing of the storekeeper. Subsequently, when Walker again asked what the charge was, Weinman reiterated, "At this point, the charge is attempted robbery and homicide."

Based on the foregoing, it is evident that Walker was sufficiently advised of the charges against him.

C.

The District Court's second conclusion that the law enforcement officials led Walker to believe that by confessing he might avoid a charge of homicide is inexorably related to the Court's determination that there was an absence of precision regarding the charges. Thus, the crux of the District Court's ruling is that the absence of precision with regard to the charges misled Walker into believing that he could avoid prosecution for homicide by confessing.

The State contends that the decision of the Court below affirming the District Court's ruling was plainly wrong. The record fully demonstrates that the officials informed Walker that he would be charged with homicide whether he confessed or not.

In its December 28, 1978 decision, the District Court ruled that the discussion of the charges by the law enforcement officials "did not constitute a further interrogation of petitioner" in violation of *Miranda* and that their discussion was undertaken *"in good faith and not with the purpose of eliciting information from petitioner."* (Emphasis added). This ruling was confirmed in all respects by the District Court in his subsequent decision on November 6, 1979 following remand. Yet, notwithstanding this confirmed ruling, the Court inexplicitly found in the November 6th decision that the officials' "good faith" discussion of the charges led Walker to believe that by confessing he might avoid a charge of homicide. That the District Court erred in this respect is clear.

At the hearing in the District Court, Weinman testified as follows as to what he meant when he said, "At this point, the charge is atempted robbery and homicide," in response to Walker's inquiry about the charge:

> "A. I know what I meant, refers back to your previous questions; at that point I didn't know whether

he would be eventually indicted for felony murder. If it didn't rise to that level in a presentment to another charge, the only charge he would be indicted on, on the prosecutor's information would have been petit larceny, but at that point he was under arrest for the homicide.

Q. So, your were trying to suggest to him that the charge might change?

A. Absolutely not." (H. 43).

In determining that the words "At this point" misled Walker, the District Court failed to recognize that the law enforcement officials could only tell Walker what he was being arrested for, not what he would be ultimately indicted for; the officials had no way of accurately predicting the precise nature of the indictment that was to be subsequently handed up by the grand jury.* Furthermore, the District Court failed to take into consideration that Weinman used the phrase "At this point, At that point", and "At that time", numerous times in his testimony at the hearings in the State Court and the District Court. The phrase merely reflects Weinman's manner of communicating and should have been considered as such by the District Court.

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* See, e.g., *United States ex rel. Kern* v. *Maroney*, 275 F. Supp. 435 (W.D. Pa. 1967), where the police did not know what the ultimate charges against the accused would be.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 8, 1980

Respectfully submitted,

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APPENDIX A

Decision of the United States District Court for the Eastern District of New York, dated November 2, 1979.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
WILLIAM WALKER,

Petitioner,

against

JOHN WILMOT, Superintendent, Elmira Correctional Facility,

Respondent.

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SIFTON, District Judge.

This proceeding is again before this Court following a remand by the United States Court of Appeals for the Second Circuit for the following purpose:

> "We therefore remand for Judge Sifton to reconsider whether Walker's testimony should be taken into account in the decision on the petition for a writ of habeas corpus. If the judge concludes that Walker's testimony should be considered, he should give the state an opportunity to present anything further it may wish by way of rebuttal to Walker's testimony, and then decide the case on the basis of all the evi-

> dence before him. If he adheres to his view that Walker was not entitled to present further evidence, or does not credit such evidence, the judge should enter a fresh judgment from which an appeal can be taken, which shall be heard by this panel, if practicable." *Walker* v. *Wilmot,* —— F.2d —— (2d Cir. 1979).

In addition, the Court of Appeals stated, in order to guide this Court's reconsideration, that "we believe that unless Walker himself was specifically and fully advised by counsel or the state judge of his right to testify without adverse consequences and chose not to do so, his failure should not bar a federal hearing." *Ibid.*

Upon remand this Court, following reconsideration, determined initially that unless further evidence was presented to demonstrate that, in the language quoted above, petitioner "was specifically and fully advised by counsel or the state judge of his right to testify without adverse consequence," it would consider petitioner's testimony on the issues concerning his confession raised by the petition. Accordingly, the case was set down for a hearing at which the State could present, in addition to further evidence with regard to the advice given Walker, any evidence it had to rebut Walker's testimony as to what occurred during his interrogation.

At the hearing Walker's counsel was recalled for the purpose of establishing what advice was given Walker concerning the consequences of testifying at his state court hearing. Walker's counsel testified that "probably in [his] own language" he advised Walker that he could testify without the testimony being used against him at trial. The actual language used by counsel was not explored presumably because counsel could not recall it. The state court judge was not recalled to testify on this subject. On the basis of this testimony, and in the light of the standard quoted above, this Court is not persuaded

that the advice to Walker concerning the consequenses of testifying was either full or specific. Accordingly, I find that Walker did not receive the "full, fair and adequate hearing" in the state court required by *Townsend* v. *Sain,* 372 U.S. 293, 312-13 (1963). As a result, it becomes necessary to consider petitioner's testimony in this Court as well as the rebuttal testimony offered in this Court by the State's witnesses and, in light of that testimony, to reexamine *de novo* the questions previously decided in the state court and by the undersigned.

When this matter was last before me for decision, it appeared that petitioner's claims raised two issues: (1) whether the conduct of the District Atorney and a detective present during an interrogation occurring shortly after his arrest violated the procedural safeguards mandated by *Miranda* v. *Arizona,* 384 U.S. 486 (1966); and (2) whether petitioner's confession was voluntary, resulting from a knowing and intelligent waiver of petitioner's constitutional rights. Both issues were resolved by this Court against petitioner on the basis of the record of proceedings raising similar issues in the state court and without this Court taking into account petitioner's testimony before the undersigned concerning the circumstances of his interrogation or hearing testimony from any other participant in the interrogation.

With regard to the *Miranda* issue, the principal question appeared to this Court at that time to be the intent and effect of the law enforcement officials having discussed the appropriate charge in petitioner's presence: whether that discussion amounted to additional interrogation after petitioner had invoked both his right to remain silent and his right to counsel. With regard to the issue of voluntariness, the principal question appeared to be whether presenting petitioner with the fact that his co-defendant had confessed and "told the truth" constituted compulsion or, on the contrary, a basis on which petitioner

could knowingly and intelligently decide what course of action it was best for him to follow. With regard to the first issue, I concluded that the law enforcement officials' discussion of the charges in petitioner's presence did not amount to continued interrogation in violation of the procedural safeguards of *Miranda*. Nothing heard following remand causes me to change my findings and conclusions on this issue.

With regard to the second issue I concluded in my earlier decision that, since the only purpose and effect of having petitioner hear his co-defendant's admission that he had told the truth was to inform petitioner accurately where he stood in response to his inquiries, the effect of such a procedure was to assist petitioner in making a knowing and intelligent choice rather than to compel a confession through irrational pressures. A different picture with regard to this second issue emerges, however, from consideration of the testimony of petitioner which was never heard by the state judge and from consideration of the testimony of the other principal participants in the interrogation offered in this Court in rebuttal to that testimony. After hearing most testimony I am obliged to conclude that petitioner confessed not after a rational, knowing and intelligent calculation of what he stood to gain and lose by confessing, but rather, as a result of an unfounded hope that by giving some account of himself he might be able to avoid a charge of having killed a man—hope created, whether deliberately or not, by the conduct of the District Attorney who questioned him.

It bears noting that, with one exception, this Court disbelieves petitioner's testimony as to what occurred during his interrogation, based on the rebuttal evidence, petitioner's interest, and on his general demeanor on the stand. Petitioner's rapid-fire reenactment of the events in his testimony before the undersigned, including what purported to be direct quotations of the colloquy between the

participants, his repeated interjection of the question "right?" addressed to the Court, and other demeanor evidence raised substantial credibility issues when first heard as, perhaps, the Court should have indicated at the time. In all events, whatever prima facie case petitioner's testimony presented concerning the beatings he is said to have suffered and other circumstances of his interrogation was, with the one exception noted above, in the undersigned's view, completely belied by the testimony of the State's witnesses at the rebuttal hearing.

However, the explanation for petitioner's lack of credibility—his interest in the outcome of the hearing—is not far to seek and does not incapacitate him from telling what in fact occurred. Because in certain limited particulars petitioner's story is borne out by other evidence and by inconsistencies in the testimony of the other participants, the Court is persuaded that in certain respects he was telling the truth.

According to petitioner, he asked the Assistant District Attorney at one point in the interrogation what he would be charged with. Petitioner's testimony was:

> "I asked Mr. Weinman, I say, 'I want to know what I'm being charged with, you know? . . .' I said, 'I want to know what the charge is.' He said, 'Are you going to speak? We'll see what it's going to be. Are you going to speak?'"

According to petitioner, it was in response to this question that he confessed.

The Assistant District Attorney, testifying before the undersigned at the rebuttal hearing, testified on this point as follows:

> "What occurred off the record was [——] I don't remember who initiated the conversation, but Lasky said something to the effect, 'what are we going to book

him for' and I mentioned attempted robbery and homicide. . . .

"THE COURT: So you didn't in your off the record colloquy [,] either in words or substance [,] say, 'I don't know what it is we're going to charge you with, we'll see what it's going to be'?

"THE WITNESS: His inquiry was in my response to Lasky when I mentioned homicide; off the record he knew he was being charged at that time with homicide.
"THE COURT: You didn't hedge on the question or leave it in doubt, you came out and said it was attempted robebry and homicide at that point?

"THE WITNESS: I don't recall if I said robbery, but I am positive I said homicide. . . ." (Transcript of September 13, 1979, hearing at pp. 45-46.)

What is peculiar about his testimony by the Assistant District Attorney is that it is not consistent with the transcript of a recorded statement taken from Walker immediately following the unrecorded colloquy between Walker and the District Attorney. The initial part of that transcript, which appears to have been made in a deliberate effort by the District Attorney to record accurately what had just transpired, includes the following series of questions:

"Q. Mr. Walker, during the 10 minute period while we were off the record and the Steno left the room, did anybody threaten you?
"A. No.
"Q. Did anybody beat you?
"A. No.
"Q. Did anybody make any promises to you?
"A. No.
"Q. Other than allow you to talk to Sanders?
"A. ——

"Q. Is your answer No?

"A. I asked you what charge it was, you said you'll see what it is and I still want to know the charge.

"Q. At this point, the charge is attempted robbery and homicide.

"A. I didn't shoot nobody.

"Q. Nobody said you shot anybody, why don't you tell me what happened?"

Indeed, this written transcript produced in an effort to accurately record what had transpired off the record is consistent with petitioner's version of what transpired off the record—that is, that petitioner's agreement to confess was obtained from petitioner as the price he had to pay in order to resolve the uncertainty as to the charge which would be made against him.

While I do not doubt that the charge of homicide was mentioned in the unrecorded colloquy between petitioner and the District Attorney, I am now convinced that petitioner gained the correct impression that the District Attorney's mind was not entirely made on this score and, most importantly, the petitioner was led, whether deliberately or not, to believe that by confessing he might avoid a charge of homicide.

I am confirmed in this conclusion by the rather elaborate and ultimately not entirely satisfactory explanation given by the Assistant District Attorney in his testimony before the undersigned of his use of the qualifying phrase, "at this time" in responding to petitioner question as to the nature of the charge against him. The District Attorney's testimony was that he used the expression "at this time" not to indicate that the homicide charge might be dropped if petitioner confessed, but rather, because he was unaware as to whether the underlying crime amounted to a felony since the value of the article taken was too small. If there was no felony, the witness seemed to suggest,

there could be no felony-murder charge, and that was why he "hedged" in using the expression "at this time" in stating the charge. Whatever conclusion it is appropriate to draw concerning the witness' credibility based on this testimony—and this Court has drawn none since it was offered admittedly as an after-the-fact rationalization by the District Attorney of his purpose in using words he used at the time—the testimony is significant because it draws attention at the instance of someone who experienced the interrogation first hand to the most unsettling aspect of the entire interrogation, namely, the failure by anyone to make clear to petitioner in the face of his obvious concern with the question that, whether he confessed or not, would not affect the determination to charge him with homicide. The portion of the petitioner's own testimony which the Court accepts, taken together with the transcript of his confession, makes clear that he wanted to know whether he could avoid a charge of homicide by persuading the District Attorney that he did not shoot anyone.

Viewed in this light, a difference between the testimony of the District Attorney and the detective in the state court hearing which this Court had originally termed "immaterial" appears in a different light. As noted in this Court's opinion filed December 28, 1978, the two state officials differed as to what the Assistant District Attorney had said in response to petitioner's statement "I didn't shoot anyone." Detective Lasky testified that petitioner was told, "we know that you didn't shoot anyone because Tony told us—that's Sanders—Tony told us that he shot the man." The District Attorney testified he had said "it doesn't matter because Sanders has already admitted that he was the shooter but he implicated you because he said you were present in the store with a gun." While the latter statement would have, in some measure, alerted petitioner to the possibility that, even if he wasn't the

"shooter," he could still be charged with homicide, the former statement suggested that the fact that he didn't shoot anyone meant that he could avoid the more serious charge. This Court is now persuaded on all the evidence that the impression conveyed to petitioner was that he might not be implicated in the shooting or charged with it if he gave an account of himself. Acting under such pressure, his choice to speak can no longer be called knowing or intelligent or voluntary, nor is it even very reliable..

In its original opinion this Court concluded, based on its review of the state court record, that petitioner's decision to confess was a "knowing, intelligent and voluntary calculation based on a belief arrived at in the face of the reality of his co-defendant's incriminating confession . . . that he no longer had anything to gain by remaining silent but perhaps could reap some benefits at that point by confessing." Having heard the State's rebuttal case and reexamined the petitioner's testimony in the light of that evidence, I am convinced that, in fact, the absence of precision with regard to the charges to be leveled against petitioner and the impression incorrectly conveyed to him that he could avoid prosecution for killing a man by confessing, whether deliberate on the part of the District Attorney or not, requires a finding that petitioner's decision to speak was not knowing and intelligent, but was instead based on confusion and mistake. There was hence no voluntary waiver of petitioner's Fifth Amendment rights and petitioner's confession obtained as a result of the questioning which followed should have been suppressed by the state court.

Accordingly, the petition for a writ of habeas corpus must be granted unless the evidence of petitioner's confession as a result of his post-arrest interrogation is suppressed and petitioner is thereafter tried within sixty days of the entry of judgment pursuant to this opinion.

The Clerk is directed to enter judgment in accordance with this question and to mail a copy of this decision to all parties.

So ORDERED.
Dated: Brooklyn, New York
November 2, 1979.

CHARLES P. SIFTON
United States District Judge

APPENDIX B

Decision of the United States Court of Appeals for the Second Circuit, dated April 23, 1980.

Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for held at the United States Court House, in the City of New York, on the 23 day of April, one thousand nine hundred and eighty.

79-2020

Present:

HONORABLE HENRY J. FRIENDLY
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. TIMBERS
Circuit Judges

WILLIAM WALKER,
Petitioner-Appellee,

—against—

JOHN WILMOT, Superintendent,
Elmira Correctional Facility,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED. In his opinion dated November 2, 1979, Judge Sifton found that petitioner's decision to confess "was not knowing and intelligent, but was instead based on confusion and mistake" because of "the absence of precision with regard to the charges to be leveled against petitioner and the impression incorrectly conveyed to him that he could avoid prosecution for killing a man by confessing, whether deliberate on the part of the District Attorney or not. . . ." Under the applicable standard of review, see, e.g., United States v. Friedman, 558 F.2d 125, 1127 (2d Cir. 1977), this finding was not clearly erroneous. Nor was it reversible error for the judge to conclude on the basis of this finding that "[t]here was hence no voluntary waiver of petitioner's Fifth Amendment rights and petitioner's confession obtained as a result of the questioning which followed should have been suppressed by the state court."

Henry J. Friendly
HENRY J. FRIENDLY
Wilfred Feinberg
WILFRED FEINBERG
William H. Timbers
WILLIAM H. TIMBERS